

No. _____ 402-2831-2705

In The
Supreme Court of the United States

JEFFREY O'BRIEN, an individual,

Petitioner,

v.

DAVID GENZLER,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a government employee of a prosecuting agency entitled to absolute immunity from civil liability claim that the employee persuaded a witness to testify falsely to secure a conviction?

PARTIES

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OPINIONS BELOW

The United States District Court for the Southern District of California's opinion which granted in part, and denied in part, Petitioner O'Brien's motion for summary judgment is unreported. The Ninth Circuit Court of Appeals' first opinion affirming the District Court's decision is reported at 384 F.3d 1092, but that opinion was withdrawn and replaced by the opinion reported at 410 F.3d 630, upon Petitioner's petitions for rehearing and *en banc* rehearing which were denied.

STATEMENT OF JURISDICTION

Petitioner O'Brien's Combined Petition for Rehearing and Suggestion for Rehearing En Banc was denied by order of the Ninth Circuit Court of Appeals published June 7, 2005. This petition for certiorari is filed within 90 days of the publication of that order. Jurisdiction of this Court is based upon 28 U.S.C. §1254(1).

STATUTE INVOLVED

42 U.S.C. §1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's

judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

1. Respondent David Genzler, hereinafter "Mr. Genzler," stabbed Dustin "Dusty" Harless to death in a fight witnessed by Mr. Harless' girlfriend, Sky Blue Flanders.

2. Thereafter, Mr. Genzler was arrested when he surrendered to police.

3. Mr. Genzler was prosecuted by the San Diego County District Attorney's Office, with Peter J. Longanbach, hereinafter "Mr. Longanbach," assigned as the Deputy District Attorney to prosecute the crime.

4. Petitioner Jeffrey O'Brien, hereinafter "Petitioner O'Brien," was employed by the San Diego County District Attorney's office as an investigator assigned to assist Mr. Longanbach in the prosecution of Mr. Genzler.

5. After a jury trial, Mr. Genzler was found guilty of second degree murder.

6. However, the conviction was reversed on appeal.

7. After a second jury trial, Mr. Genzler was convicted of involuntary manslaughter.

8. Mr. Genzler thereafter brought the underlying 42 U.S.C. §1983 civil rights suit alleging Petitioner O'Brien, along with others from the San Diego County District Attorney's Office, violated his civil rights by, among other things, coercing witness Sky Blue Flanders to commit perjury.

9. In the District Court, Petitioner O'Brien moved for summary judgment claiming entitlement to absolute prosecutorial immunity.

10. The motion was granted in all respects except in regards to the allegations made in Paragraph 66 of Mr. Genzler's complaint wherein Mr. Genzler alleged Petitioner O'Brien persuaded witness Sky Blue Flanders to lie "in order to secure a conviction."

11. The Ninth Circuit Court of Appeals affirmed the District Court's decision September 27, 2004.

12. The Court of Appeals determined Mr. Genzler's evidence in opposition to the motion for summary judgment raised a triable issue of material fact as to whether Petitioner O'Brien was performing investigative functions when meeting witness Sky Blue Flanders and, thus, was not entitled to absolute immunity.

SUMMARY OF ARGUMENT

Petitioner O'Brien urges the Court to reverse the Ninth Circuit's decision on grounds the decision misinterprets the import of Respondent Genzler's Paragraph 66 allegations to deny Petitioner O'Brien absolute immunity thereby establishing an impractical precedent which likely

will bridle the function of prosecutors and their support staff in the prosecution of crime.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION MISINTERPRETS THE IMPORT OF MR. GENZLER'S PARAGRAPH 66 ALLEGATIONS TO DENY PETITIONER O'BRIEN ABSOLUTE IMMUNITY.

The Paragraph 66 allegations of Mr. Genzler's First Amended Complaint survived Petitioner O'Brien's summary judgment motion. Therein Mr. Genzler alleged Petitioner O'Brien "suborned perjury. Specifically, prior to the preliminary hearing and during the initial investigation of the incident, Longanbach and O'Brien met with Ms. Flanders and told her that in order to secure a conviction she needed to lie about what she saw on the night of the incident and about Mr. Harless' violent past."¹ Thus, Mr. Genzler claims Petitioner O'Brien committed actionable misconduct in the context of preparing witness Flanders to testify falsely in court.

Such misconduct, if any, occurred as part of advocacy in preparing a criminal case for prosecution, not as part of investigating that crime. Investigation does not encompass the act of suborning perjury. Suborning perjury is quasi-judicial, not investigatory. Nonetheless, irrespective of Mr.

¹ There is no appendix submitted herewith. Petitioner Longanbach and Petitioner San Diego County District Attorney's Office have each filed appendices in connection with their similar petitions. Petitioner O'Brien respectfully requests the Court refer to those appendices for reference to Mr. Genzler's First Amended Complaint, the District Court's order and the Ninth Circuit's opinion sought to be reviewed.

Genzler's own allegations, the Ninth Circuit found witness Flanders was arguably told to lie "in a process of investigation, or, viewed in the light most favorable to Genzler, a process of manufacturing evidence while performing police type investigative work – *not Longanbach or O'Brien acting as advocates by actively preparing Flanders for her testimony in Court.*" *Genzler v. Longanbach*, 410 F.3d 630 (9th Cir. 2005), at 639 (emphasis added). This conclusion contradicts the plain meaning of Mr. Genzler's own Paragraph 66 allegations.

According to Mr. Genzler's own First Amended Complaint, Petitioner O'Brien's allegedly violated Mr. Genzler's civil rights by persuading witness Flanders to testify falsely. Paragraph 66 contains no allegation that Petitioner O'Brien was making inquiries, searching for clues, or investigating witness Flanders' information. According to Mr. Genzler's own complaint, Petitioner O'Brien was not performing an investigation, but rather was preparing witness Flanders to testify. This is an advocatory function.

Preparing a witness to testify is protected by absolute immunity. *See, Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) at 273, wherein the court noted, "[t]here is a difference between the advocate's role in evaluating evidence *and interviewing witnesses as he prepares for trial*, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand."

Ironically, if the District Court's decision permitting Mr. Genzler's Paragraph 66 allegations to survive Petitioner O'Brien's summary judgment motion is allowed to stand, then at trial, should Mr. Genzler in fact prove

Petitioner O'Brien persuaded witness Flanders to testify falsely, then Mr. Genzler will have also proved the quasi-judicial nature of Petitioner O'Brien's act and, ipso facto, the applicability of absolute immunity in Petitioner O'Brien's favor.

II. THE NINTH CIRCUIT'S DECISION ESTABLISHES AN IMPRACTICAL PRECEDENT WHICH LIKELY WILL BRIDLE THE FUNCTION OF PROSECUTORS AND THEIR SUPPORT STAFF IN THE PROSECUTION OF CRIME.

The doctrine of absolute immunity for prosecutors and their staff engaged in quasi-judicial functions is grounded in the belief that those prosecuting crimes must be free and unfettered to do so without fear that they will have to defend claims easily asserted, regardless of how difficult of proof, in subsequent civil suits brought by disgruntled and/or convicted criminal defendants. Absolute immunity is a levee of protection against the flood waters of litigation which are easily forecast in an environment of hostility existing between prosecutors and criminal defendants, many of whom often have considerable free time on their hands. The Ninth Circuit's decision creates a breach in the levee by carving out a zone where absolute immunity does not protect despite the criminal defendant's concession expressed in the pleadings of his own complaint that the grievance arises from the quasi-judicial act of persuading a witness to falsely testify in court. This is a dangerous result.

At a minimum, this Court should reinforce the doctrine of absolute immunity by holding it applies in this case given Mr. Genzler's own allegations, or, better yet, establish a bright-line divide to characterize between

investigatory and advocatory functions in order that prosecutors and their staff make know where the boundaries are and where the protection applies and where it does not.

CONCLUSION

Both the District Court's order denying Petitioner O'Brien absolute immunity from the Paragraph 66 allegations of Mr. Genzler's complaint, and the Ninth Circuit's decision affirming the District Court's order, should be vacated, and the matter remanded with instructions the District Court grant Petitioner O'Brien's motion for summary judgment in its entirety.

Respectfully submitted,

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